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Supreme Court of the United States

OCTOBER TERM, 1935

No. [illegible]

LEVY RICE MILLING CO., INC.,
PETITIONER,

v.

RUFUS W. FONTENOT, INDIVIDUALLY AND AS ACTING UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF LOUISIANA,
RESPONDENT.

MOTION FOR INJUNCTION TO PRESERVE STATUS QUO

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New Orleans, La.

MERRICK, SCHWARZ, GUSTE, BARNET & REDMANN,
New Orleans, La.

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TO THE HONORABLE BENJAMIN N. CARDOZO, *Associate Justice of the Supreme Court of the United States:*

Comes now Levy Rive Milling Co., Inc., by its counsel, M. B. Redmann, and respectfully states that petitioner on October 28, 1935, brought a bill in equity in the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled Levy Rice Milling Co., Inc., Plaintiff, v. Rufus W. Fontenot, Individually and as

Acting United States Collector of Internal Revenue for the District of Louisiana, Defendant, and numbered 326 in Equity in the New Orleans Division of said court. In its bill of complaint in said cause petitioner prayed for a temporary restraining order to be issued immediately, and for a preliminary injunction after notice to the respondent, and for a permanent injunction on the final hearing of said cause, enjoining the respondent from assessing or collecting or attempting to assess or collect from the petitioner in any manner whatsoever, whether by lien or jeopardy or distraint proceedings, in court or otherwise, any processing taxes levied under and pursuant to the Act of the Congress of the United States known as the Agricultural Adjustment Act, and amendments thereto, or purported to be levied by said Act, upon the petitioner for the processing of rice during the month of September, 1935, and for subsequent months, and any interest or penalty on account of petitioner's failure to pay said processing tax, and from imposing or giving notice of intention to impose any lien for said taxes upon the property, real or personal, of petitioner. Said application for preliminary injunction was set down for hearing before the judge of said District Court at New Orleans on Monday, October 28, 1935. Notice thereof was duly waived by respondent. Prior to said hearing respondent filed his motion to dismiss said bill, copies of which motion and also of petitioner's bill of complaint are contained in the record in this cause now brought to this Court on petition for certiorari.

After a hearing on petitioner's motion for preliminary injunction and on respondent's motion to dismiss, the Honorable John McDuffie, acting judge of said District Court, on October 28, 1935, refused petitioner's motion for preliminary injunction, granted the motion of respondent to dismiss the said bill of complaint, and dismissed the said bill of complaint, to which petitioner herein duly excepted. Thereafter on the 29th day of October, 1935, the petitioner herein in open court and in the presence of counsel for respondent filed its petition for an appeal, which was duly allowed by the said judge of the United States District Court who tried said cause, and filed at the same time its assignments of error, and also a cost bond was duly filed and approved by the said judge of said District Court. At the time petitioner presented its said petition for appeal, it also petitioned said judge of the District Court to grant it an injunction enjoining the respondent in the manner set out in its request for a preliminary injunction in its bill of complaint, pending the appeal of petitioner to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, but the said judge of said District Court refused petitioner's said petition and refused to grant petitioner said injunction pending said appeal.

Petitioner perfected its appeal to the Circuit Court of Appeals for the Fifth Circuit, making said cause returnable at New Orleans, Louisiana, as provided by law, and duly caused to be prepared a transcript of the record in said cause and filed the

same, in accordance with law and within the time allowed by law, in the office of the clerk of said Circuit Court of Appeals at New Orleans, Louisiana, and said cause was duly docketed in that Court as "Levy Rice Milling Co., Inc., Appellant, v. Rufus W. Fontenot, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, No. 7949."

On November 5, 1935, after notice of respondent, petitioner filed in said Circuit Court of Appeals its motion for a preliminary injunction pending the hearing of its appeal enjoining respondent from assessing or collecting from petitioner said taxes. The Circuit Court of Appeals on November 5, 1935, denied petitioner's said motion, stating in its opinion that

> "the taxpayer has a remedy at law to recover back any taxes illegally exacted, and, further that the provisions of the Act as amended deprive the Court of jurisdiction to grant injunctive relief."

Both in the District Court and in the Circuit Court of Appeals petitioner offered to give such security as the court might require in the event the court should ultimately decide the cause against petitioner.

Petitioner has filed in the Supreme Court of the United States its petition for a writ of certiorari in this cause and the record therein.

In said bill of complaint petitioner alleged that the amount of processing taxes on account of the

rice processed by the petitioner during the month of September, 1935, was $17,721.23, and that under said Agricultural Adjustment Act petitioner was required to pay said amount to respondent on or before October 30, 1935, and that respondent was charged with the duty of collecting said tax, and if said tax were not paid on or before October 30, 1935, respondent would assess said tax against the petitioner and serve upon petitioner notice and demand for the payment thereof and would allow petitioner ten days from receipt of such notice within which to pay the same; that in the event said tax should not be paid within said time, respondent would assess against petitioner a penalty equal to 5 per cent of the amount of the tax and interest on the tax at the rate of 1 per cent per month from the due date of the tax until paid; that if the petitioner failed to pay the tax within said ten days, respondent would proceed to collect the tax, penalty and interest by filing a notice of lien on all of petitioner's property and by distraining upon and selling such of petitioner's property as might be necessary to realize the amount of said tax, penalties and interest; and that additional processing taxes for months subsequent to September, 1935, will accrue and be assessed against and collected from the petitioner in the same manner as the tax for the month of September.

Petitioner alleged that the said processing tax was illegal and unconstitutional, and violated various provisions of the Constitution of the United States in many particulars, more fully set forth in peti-

tioner's bill of complaint. The petitioner also alleged that under an amendment to said Agricultural Adjustment Act approved on August 24, 1935, a Section 21(d) was added to said Act, which section provides in substances that petitioner should be allowed no recovery of any of said taxes paid, if the same should be illegal or unconstitutional, unless petitioner established to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner should so find, that neither petitioner nor any person directly or indirectly under petitioner's control or having control over petitioner, has, directly or indirectly, included such amount in the price of the rice with respect to which it was imposed or of any article processed from the rice with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing rice, and that the price paid by the petitioner or such person for said rice was not reduced by any part of such amount. Petitioner in said bill of complaint, alleged, as more fully set out therein, that under said Section 21 (d) it had no adequate remedy at law by which it could recover any part of said taxes if same were unconstitutional and illegal, and that it was impossible, owing to the peculiar conditions existing in the rice milling industry and in the purchase, milling and sale of rice, for petitioner to discharge the burden placed upon it by said Section 21 (d), all as more fully set out in petitioner's bill of complaint.

Petitioner further alleged that in said amendment of August 24, 1935, a new section known as Section 21 (a) was added to said Agricultural Adjustment Act, which in substance provided that no suit to enjoin the collection of said processing taxes should be maintained in any court. Petitioner further alleged that said section was not intended to apply, and did not apply, to the injunction prayed for by petitioner, inasmuch as petitioner had no adequate remedy at law. Petitioner further alleged that if said section should be interpreted as prohibiting the injunction prayed for by petitioner, then the said section, together with the other provisions of said Act, was invalid and in violation of the Fifth Amendment to the Constitution, that no person shall be deprived of his property without due process of law, in that said illegal and unconstitutional taxes would be collected from petitioner and petitioner would have no remedy by which it could recover taxes and would have no remedy to prevent the collection of said unlawful taxes and would be forever deprived of the right to test the constitutionality of said taxes.

Petitioner further alleged that said Section 21 (d) denied the petitioner a complete and adequate remedy at law for the various other reasons set forth in said bill of complaint.

At the hearing before the district judge petitioner introduced in evidence the affidavit of W. M. Reid, executive secretary of The Rice Millers' Association, a man of twenty-six years' experience in the rice business, in which affidavit he set out fully and

in detail the methods of conducting the rice business and the manner in which the rough rice market and the clean rice market is made, showing that it would be utterly impossible for any rice miller to accurately determine whether he had made a profit or a loss on any given transaction, much less prove whether he had passed the tax, or any part thereof, on. Petitioner also introduced in evidence the affidavit of Homer L. Bruce, a practicing attorney at the bar at Houston, Texas, setting out in detail the proceedings under a complaint brought by the Secretary of Agriculture to revoke the license of a rice mill under the Act in effect prior to the present Act. The Secretary of Agriculture sought to revoke the license of this mill for failure to sell clean rice and rice products processed from rough rice at a price approximately 89 cents higher than the price paid for the rough rice. The affidavit showed that, although the government was able to prove the cost of the rough rice and to trace the particular rough rice into various "mixes" of clean rice and the price procured for these "mixes" of clean rice, it was never able to prove that the price procured for the clean rice processed from the particular lot of rough rice, was not 89 cents more than the price paid for the rough rice, because of the fact that clean rice is customarily sold in "mixes" of various lots of rice and there was no way to allocate the price procured for the mixed rice sold to the various lots of rough rice which went into the mix.

In the meantime, petitioner alleges that for the foregoing reasons and those set forth in its said

bill of complaint in said cause, and because the judge of said District Court in his said order dismissed said bill of complaint and refused to grant petitioner the injunction prayed for pending the appeal in this case, and because the Circuit Court of Appeals has denied petitioner's application for an injunction pending the hearing of its appeal, and because it will be several months before said Circuit Court of Appeals will hear its appeal and because the Circuit Court of Appeals in its opinion and order denying petitioner its said injunction has virtually decided and disposed of petitioner's appeal for all practical purposes, the respondent herein will, to the irreparable damage and loss of the petitioner herein, proceed to collect the said taxes for September, 1935,—which are now due and unpaid, from petitioner, and said taxes for subsequent months, unless restrained by a preliminary injunction granted by this Court. The petitioner alleges that not only has it no complete remedy at law, but in fact no remedy at law at all, for the reasons hereinabove set forth and set forth more in detail in said bill of complaint, that it is faced with the alternative of paying the tax with the certainty that no remedy at law exists for its recovery in case it be held that it was unconstitutionally assessed, or of refusing to pay and running the risk of becoming liable for the heavy civil and criminal penalties provided in the Act, and that the said judge of said District Court should not have dismissed said bill of complaint, but should have overruled the same, and upon the hearing should have granted the prelimi-

nary injunction as prayed for in said bill of complaint, and the Circuit Court of Appeals should have granted petitioner the injunction pending its appeal.

Petitioner would further show that there is now pending in the Supreme Court of the United States a case involving the constitutionality of the said Agricultural Adjustment Act, being the same case in which the Circuit Court of Appeals for the First Circuit declared the Act to be unconstitutional, and that the Supreme Court has set said cause for oral argument on Monday, December 9, 1935; that a decision by the Supreme Court of the United States upon the validity of the said Act may be expected within a reasonable time thereafter; that the first benefit payment to farmers provided for in said Act has been made, and that under the standard form of contract between the Secretary of Agriculture and rice farmers no further payment is due until such time after December 1, 1935, as the secretary shall determine and declare what further amount of benefit payments shall be made and when they shall be made; that the taxes to be collected under said Act are for the purpose of making these benefit payments and that since the Secretary of Agriculture need make no further benefit payments until such time after December 1, 1935, as may be fixed by him, the delay of the Government in collecting these taxes which might be occasioned by the granting of the injunction prayed for herein will not occasion any injury to the Government nor will it unduly interfere with the achievement of the program set out in said Act if the Act be held constitutional. On the

other hand, as hereinabove alleged, great and irreparable damage will be done to petitioner in the event the law is held unconstitutional unless the injunction hereinafter prayed for is granted.

Petitioner further shows that it is informed that every other Circuit Court of Appeals to consider the question, namely, the Second, Sixth, Eighth, Ninth and Tenth, has granted injunctions pending appeal contrary to the action herein by the Circuit Court of Appeals for the Fifth Circuit.

Petitioner further shows that unless an injunction pending appeal be granted so as to preserve the *status quo*, the subject-matter of the suit will be lost and the jurisdiction of this Honorable Court defeated. Such injunction is necessary to preserve the jurisdiction of this Honorable Court, and in order that petitioner may enjoy the just fruits of a favorable decision herein.

The petitioner states that it is ready and willing to give any reasonable bond or other security that may be required by any order of this Court, including the deposit from month to month of the amount of tax due, in a depository to be designated by the Court, and therefore prays that this Court make an order granting petitioner a preliminary injunction enjoining and restraining the respondent, and his successors in office, from assessing or collecting or attempting to assess or collect from petitioner in any manner whatsoever, whether by lien or jeopardy or distraint proceeding, in court or otherwise, the said processing taxes for the month of September and subsequent months and any other processing taxes

under and pursuant to said Agricultural Adjustment Act upon rice processed by petitioner, and any interest or penalty on account of petitioner's failure to pay said processing taxes, and from imposing or giving notice of intention to impose any lien for said taxes upon the property, real or personal, of the petitioner, pending the hearing of petitioner's petition to this Honorable Court for a writ of certiorari in this cause, and if said petition is granted, pending the hearing of this cause by this Honorable Court, and upon such conditions and terms as to this Court may seem just.

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M. B. REDMANN,
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MERRICK, SCHWARZ, GUSTE, BARNET & REDMANN,
New Orleans, La.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Before me, the undersigned authority, on this day personally appeared M. B. Redmann, known to me and who being by me duly sworn, deposed and said on his oath as follows: That he is one of counsel for petitioner in the above cause, and has read the foregoing motion; that he is personally familiar with the matters and things therein alleged, and that the same are true except as to such matters as are alleged on information and belief, and as to them he believes them to be true.

Sworn to and subscribed before me this the 14th day of November, A. D. 1935.

[SEAL] (Sgd) William J. Guste

Notary Public in and for Orleans Parish, La.